

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

State of New Hampshire

v.

Jeffrey Bean

Docket No.: 01-S-681-F

**ORDER ON DEFENDANT'S MOTION TO STRIKE SURPLUSAGE FROM INDICTMENT**

The defendant is charged with Simple Assault, Attempted Murder, and two counts of First Degree Assault. The defendant moves to strike certain language from the indictment in docket number 01-S-681-F ("the indictment"), which charges him with two counts of First Degree Assault. The State objects.

Count One of the indictment states that, on August 4, 2001, the defendant

[d]id purposely cause serious bodily injury to another, in that Jeffrey Bean did slash Stanley Gorham's abdomen with a knife, causing partial evisceration of the victim's bowels, and Jeffrey Bean was substantially motivated to commit said crime because of hostility toward the victim's race.

Count Two states that the defendant

[d]id knowingly cause bodily injury to another by means of a deadly weapon, in that Jeffrey Bean did slash Stanley Gorham's abdomen with a knife, and Jeffrey Bean was substantially motivated to commit said crime because of hostility toward the victim's race.

The defendant argues, under both the United States and New Hampshire Constitutions, that the phrase "and Jeffrey Bean was substantially motivated to commit

said crime because of hostility toward the victim's race" is surplusage and prejudicial and should therefore be stricken from the indictment. In support of this argument, the defendant first asserts that the phrase is not an element of the offense, but rather refers only to the defendant's motive. The defendant concludes that because the phrase is not an element of the offense, it may be disregarded as surplusage.

The defendant also argues that pursuant to the United States Supreme Court's decision in Apprendi v. New Jersey, 120 S.Ct, 2348 (2000), RSA 651:6, which allows for extended terms of imprisonment upon a court's finding of, *inter alia*, motivation to commit a crime based on a person's race, is unconstitutional. According to the defendant, RSA 651:6 is unconstitutional because it permits extended terms of imprisonment upon a court finding, rather than a jury finding, of a specific fact or facts as set forth in the statute. Essentially, the defendant asserts that the State is attempting to remedy the constitutional infirmity of RSA 651:6 by requesting the jury to make a finding the legislature required the judge to make.

The court considers the defendant's arguments under the State Constitution first. See State v. Ball, 124 N.H. 226 (1983). Because Part I, Article 15 of the New Hampshire Constitution is at least as protective of an accused's due process rights as the United States Constitution, the court addresses the defendant's claims under the New Hampshire Constitution and refers to federal authority only to assist in the analysis. State v. King, 145 N.H. 717, 719-20 (2001).

The legislature has the authority to define criminal acts and to prescribe the corresponding punishments which conform to constitutional limits. See Doe v. State, 114 N.H. 714, 718, (1974), State v. Farrow, 118 N.H. 296, 305, (1978); see also N.H. CONST.

pt. II, art. 5. Additionally, RSA 625:6 states that “[n]o conduct or omission constitutes an offense unless it is a crime or violation under this code or under another statute.”

First Degree Assault is defined as follows:

A person is guilty of a class A felony if he:

- (a) Purposely causes serious bodily injury to another; or
- (b) Purposely or knowingly causes bodily injury to another by means of a deadly weapon, except that if the deadly weapon is a firearm, he shall be sentenced in accordance with RSA 651:2, II-g; or
- (c) Purposely or knowingly causes injury to another resulting in miscarriage or stillbirth; or
- (d) Knowingly or recklessly causes a serious bodily injury to a person under 13 years of age.

RSA 631:1(I). An element of an offense is defined as

such conduct, or such attendant circumstances, or such a result of conduct as:

- (a) Is included in the definition of the offense; or
- (b) Establishes the required kind of culpability; or
- (c) Negatives an excuse or justification for such conduct; or
- (d) Negatives a defense under the statute of limitations; or
- (e) Establishes jurisdiction or venue.

RSA 625:11(III). According to RSA 625:10, a person may only be convicted of an offense if the State proves each element of the offense beyond a reasonable doubt.

RSA 651:6 provides that a convicted individual will receive an extended term of imprisonment “if the court also finds, and includes such findings in the record, that . . . [h]e was substantially motivated to commit the crime because of hostility towards the victim’s religion, race, creed, sexual orientation as defined in RSA 21:49, national origin or sex . . . .” Thus, New Hampshire’s legislature has determined that, motive, which in this case is charged as relating to the victim’s race, is not an element of First Degree Assault but is a factor that exposes the convicted individual to an extended term of imprisonment.

Recently, however, the United States Supreme Court held it unconstitutional to allow extended terms of imprisonment based on a judge's finding of particular facts. Apprendi, 120 S.Ct. at 2363, 2366-7. In Apprendi, the defendant was arrested for firing several .22-caliber bullets into the home of an African-American family. After being questioned by the police, the defendant admitted to shooting into the home, and stated that although he did not know the family personally, he wanted them out of the neighborhood because they were "black in color." Id. at 2351. The defendant plead guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of the third-degree offense of possession of a prohibited weapon. The defendant was then sentenced to an extended term of imprisonment under New Jersey's "hate crime law", based on the trial judge's finding that the defendant's "actions were taken 'with a purpose to intimidate' as provided by the [hate crime] statute." Id. at 2352.

On appeal to the Supreme Court, the defendant argued that New Jersey's hate crime statute, by allowing a judge to find facts which authorize an extended term of imprisonment, violated his rights under the Due Process Clause of the United States Constitution. The Court agreed, concluding that

[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in Jones v. United States, 526 U.S. 227 (1999): "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

...

By its very terms, this [hate crime] statute mandates an examination of the defendant's state of mind - a concept known well to the criminal law as the defendant's *mens rea*.

...

The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense "element."

Id. at 2362-3, 2364 (citations omitted).

The New Hampshire Supreme Court recently referred to Appendi in determining whether a trial judge had erroneously sentenced the defendant to prison for more than one year for offenses charged by information rather than by indictment. See State v. Ouellette, 145 N.H. 489, 490 (2000). The Ouellette court, relying on State v. Smith, 144 N.H. 1 (1999), concluded that indictments were required because the defendant's extended terms of imprisonment under RSA 651:6 were based on facts related to the offense itself, not on the defendant's recidivism, and resulted in a prison sentence greater than one year. The court then stated

[o]ur holding is supported by the recent United States Supreme Court decision in Appendi v. New Jersey, 120 S.Ct, 2348 (2000). In Appendi, the Court held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Here, the sentencing enhancement factor – that the defendant knew that the victim was a law enforcement officer acting in the line of duty - is an element of the charged offenses. Thus, the defendant was required to be charged by indictment.

Ouellette, 145 N.H. at 491.

In this case, the State asserts that it has complied with both Appendi and Ouellette because the disputed phrase is a necessary element of the crime and must, as the State has done in this case, be alleged in an indictment. The court agrees. Contrary to the defendant's argument, the disputed language is not surplusage. Rather, because it relates to the offense itself, the disputed language is an element of the charged offense that must be proven beyond a reasonable doubt, namely, that the First Degree Assault was substantially motivated by hostility toward the victim's race.

The question remains, however, whether in the aftermath of Apprendi, RSA 651:6 is unconstitutional in its present form. The State claims that because Apprendi vacated only the defendant's sentence and not his underlying conviction, the State may still charge and obtain a conviction under RSA 651:6.

In holding that the Due Process Clause of the United States Constitution requires that the finding of bias under New Jersey's hate crime statute be proved to a jury beyond a reasonable doubt, the Court stated that "[New Jersey's] practice cannot stand." Apprendi, 120 S.Ct. at 2363. The Court then concluded that "[t]he New Jersey procedure challenged in this case is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system. Accordingly, the judgment of the Supreme Court of New Jersey is reversed, and the case is remanded for further proceedings not inconsistent with this opinion" Id. at 2366-7.

The judgment of the New Jersey Supreme Court was an affirmation of the Appellate Division of the Superior Court of New Jersey's conclusion that the hate crime statute was not unconstitutional. See id. at 2352. Specifically, the Appellate Division "[w]hile recognizing that the hate crime law did expose defendants to 'greater and additional punishment' . . . held that that 'one factor standing alone' was not sufficient to render the statute unconstitutional." Id. at 2352-3 (citations omitted). A divided New Jersey Supreme Court affirmed, concluding that "the hate crime provision was valid" and rejecting the notion that the increase in the maximum penalty to which the defendant could be subject "alone[,] would 'change the constitutional calculus' [of the statute]." Id. at 2353. Based on the reasoning employed by New Jersey's Appellate Division and Supreme Court, which was reversed by the United States Supreme Court, it is clear that the New Jersey hate crime statute as enacted was held unconstitutional by virtue of the fact that it

allowed a judge, by a preponderance of the evidence, rather than a jury, beyond a reasonable doubt, to find the facts which justify an extended term of imprisonment.

Part I, article 15 of the New Hampshire Constitution states, in pertinent part, that “[n]o subject shall be arrested . . . or deprived of his . . . liberty . . . but by the judgment of his peers . . . .” As stated previously, RSA 651:6 provides that a defendant may be sentenced to an extended term of imprisonment if “the court” finds, and sets forth on the record, any of the facts set forth in RSA 651:6(I) sections (a) through (n). To be constitutional in light of Apprendi, therefore, RSA 651:6 must be susceptible of a reading that allows a jury, rather than a judge, to determine the facts which justify an extended term of imprisonment.

The court first considers the plain meaning of the words used in RSA 651:6, “according to the common and approved usage of the language.” State v. Johnson, 134 N.H. 570, 575-6 (1991) (citation omitted). The court, however, will not literally interpret a phrase if doing so removes the phrase from the context of the whole. Id. at 576 (citation omitted). Furthermore, the court will not construe a statute as unconstitutional “where it is susceptible of a constitutional construction,” id. (citation omitted), as long as the threshold requirement of “an ambiguity that necessitates judicial interpretation” is first met. Bradley Real Estate Trust v. Taylor, Commissioner, 128 N.H. 441, 445 (1986).

The court finds that RSA 651:6 meets the threshold requirement of ambiguity that necessitates judicial interpretation. “Court” is defined as “[a] person or body of persons appointed to hear and submit a decision on civil cases,” The American Heritage Dictionary of the English Language (1980); “an official assembly for the transaction of judicial business,” Webster’s Ninth New Collegiate Dictionary (1984); and “[a] body organized to administer justice, and including both judge and jury,” Black’s Law Dictionary, 6<sup>th</sup> Edition

(1990). See State v. Dixon, 144 N.H. 273, 283(1999), State v. Beckert, 144 N.H. 315, 317 (1999) (both following rule of statutory construction which provides that when term not specifically defined in statute, dictionary may be used to obtain its common meaning). Thus, the common meaning of the term “court” could be either a judge, a jury, or both. “Court” will not be construed to mean only a judge where doing so would render 651:6 unconstitutional, because “court” is susceptible of a meaning that would preserve the constitutionality of the statute. See Johnson, 134 N.H. at 575-6.

Only a judge may sentence a convicted individual. R. McNamara, 2 New Hampshire Practice, Criminal Practice and Procedure §1032 at 516 (1997) (“sentencing is a function of trial judges . . .”). RSA 651:6 states that “[a] convicted person may be sentenced [to an extended term of imprisonment] if the court also finds, and includes such findings in the record, that . . . [h]e was substantially motivated to commit the crime because of hostility towards the victim’s . . . race.” RSA 651:6 can thus be read as allowing a judge to sentence an individual to an extended term of imprisonment if the jury also finds that the person was substantially motivated to commit the crime because of hostility toward the victim’s race. Furthermore, the jury’s findings will be necessarily included in the record, as required by RSA 651:6, as the facts justifying an extended term of imprisonment will be alleged in an indictment, and the jury’s verdict indicating that such facts were indeed found will be a matter of record. Therefore, the purpose of generating a record of the factual findings which justify an extended term, namely, to provide an appellate body with the basis for either affirming or reversing the conviction and sentence, will be met. Cf. State v. Gilbert, 121 N.H. 305, 313 (1981) (absent record, court cannot decide whether trial court erred).



Thus, the court concludes that RSA 651:6, if construed to provide that a judge make the predicate factual findings, is unconstitutional. However, because the statute is susceptible to a reading that renders it constitutional, the State may seek an extended term of imprisonment without violating the Apprendi principles by alleging the predicate facts in an indictment or complaint and proving the facts to the trier of fact beyond a reasonable doubt.

Accordingly, the defendant's Motion to Strike Surplusage from Indictment is **DENIED.**

So Ordered.

April 26, 2002  
Date

Bruce E. Mohl  
Presiding Justice